

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-SIX**

OUTOKUMPU COPPER FRANKLIN, INC.
Employer

and

Case 26-RC-8386

**UNITED STEELWORKERS
OF AMERICA, AFL-CIO-CLC**
Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Outokumpu Copper Franklin, Inc., is engaged in the wholesale manufacturing of copper tubing. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The petition, as amended, seeks a unit of about 239 full-time employees¹ consisting of all production and maintenance employees, lab technicians, and plant clericals. Following a hearing before a hearing officer of the Board, the parties filed briefs with me.

The issue raised in the hearing is whether 46 temporary employees, who were previously employed by a supplier employer but are now solely employed by the Employer, should be included in the petitioned-for unit. The Employer asserts that these employees share a sufficient community of interest to be included in the unit. The Petitioner opposes the inclusion of these employees.

I have considered the evidence adduced during the hearing and the arguments advanced by the parties in their briefs. As discussed below, I have concluded that the

¹ This number includes "introductory" employees that have not yet completed their 60-day probationary period.

temporary employees share a sufficient community of interest and must be included in the petitioned-for unit. Accordingly, I have directed an election in a unit that consists of approximately 285 employees, and includes the temporary employees.

To provide a context for my discussion of this issue, I will first discuss the Employer's operations and personnel. Then, I will present an analysis of the issue, discuss the relevant facts, and set forth the reasoning that supports my conclusions.

I. THE EMPLOYER'S OPERATIONS AND PERSONNEL

The Employer manufactures light wall copper tubing for the air-conditioning industry at its Franklin, Kentucky facility. The Employer's facility consists of approximately 165,000 square feet under one roof with various departments including grooved ("IG") weld lines; smooth tubing lines; level wind; hairpins and furnace. In addition, there are separate shipping and receiving areas.

The Employer employs three categories of employees who perform production and maintenance work: regular full-time employees, introductory employees, and temporary employees.² As described in the Decision in the prior representation case involving these parties,³ full-time employees are those employees who are not in a temporary or introductory status and are regularly scheduled to work a full-time schedule. Introductory employees are employees whose performance is being evaluated for 60 days to determine whether further employment in a specific position is appropriate. Temporary employees

² There are regular temporary employees who are in dispute here and summer temporary employees who are not in dispute. The parties agreed that the summer temporaries are ineligible and should not be included in the unit.

³ On June 6, 2001 the Board issued a decision in Case 26-RC-8236 which held that temporary employees of supplier employers had such a strong community of interest with the Employer's employees that their inclusion in the unit was mandated. 334 NLRB 263.

are hired as interim replacements, to temporarily supplement the work force, or to assist in the completion of a specific project.

From about December 2002 or January 2003 to September 15, 2003, Holland Group, a staffing company, supplied the temporary employees to the Employer. After the initial hearing in this case, Holland notified the Employer that it would no longer provide temporary employees to the Employer. Effective September 15, 2003, the Employer hired all the temporary employees previously supplied by Holland and placed those employees directly on its payroll as temporary employees. The Employer notified the temporary employees that they were being placed on the Employer's payroll as temporary employees and that all other conditions of their employment would remain the same as when they had been employed by Holland.

The Employer operates four shifts, with first shift working from 7a.m. to 3 p.m., second shift working 3 p.m. to 11 p.m., third shift working from 11 p.m. to 7 a.m., and the fourth working 8 hours on Friday and 16 hours on Saturday and Sunday. Employees work a three-week rotating schedule, working five days the first week, seven days the second week, and four days the third week. Temporary employees work on all four shifts and in all departments.

The Employer's hiring criteria for temporary employees is the same as that applied to full-time employees: they must be 18 years of age, have a high school diploma or GED, pass a drug screen and complete a criminal background check.

Employment Conditions:

The Employer controls all employment conditions for all its employees including their wages, benefits, department assignments, shift assignments, starting times, break

times, and the number of hours they work, including any overtime. None of the employees punch a time clock. Rather, all employees, including temporaries, have their time recorded by their supervisor.

All employees, including temporary employees, attend the same employee meetings and are subject to the same work rules, including drug testing, safety rules, and dress code. There are differences in the attendance and discipline policies as applied to full-time, introductory, and temporary employees. Full-time employees are allowed 10 attendance points prior to termination, with intermediate warning and suspension steps, while temporary and introductory employees are only allowed 5 points with no intermediate steps prior to termination. Temporary employees have the same payday and the same access to the Employer's facilities as the full-time employees. All employees use the same break rooms, restrooms, parking facilities and lockers. Although lockers are not assigned to temporary employees, they may use available unassigned lockers, as do full-time employees who have not yet been assigned a locker. If a temporary employee is going to be absent, their call in/contact instructions are the same as for full-time and introductory employees.

Temporary employees work in all departments on all shifts and regularly fill in for full-time employees who are absent. Temporary employees are eligible to become certified in the same jobs as full-time employees. When performing their jobs, the duties of the temporary employees are the same as those of full-time employees. Temporary employees may, on request, be considered for any full-time position that becomes available with the Employer. Temporary employees begin earning \$8 per hour and may receive increases of 50 cents after 6 months and one year. Introductory employees earn \$9.22 per

hour. When introductory employees become full-time employees, their wages increase to the amount set for the particular job they are performing, between about \$14 and \$17.50 per hour.

There is a 15-month limit on the time an employee can remain a temporary with the Employer. The record reflects that not all temporaries become full-time employees of the Employer. The record also reflects that all temporary employees on the payroll as of December 2001 were hired as full-time employees and since November 2001, no employee has been forced to leave employment with the Employer because of the 15-month rule. While the record reveals that some named temporary employees do not appear on the list of full-time employees, the reason for their having left their employment is not disclosed.

Of the 64 individuals the Employer has hired since July 2001, the Employer testified that only two maintenance electricians were not previously employed as temporary employees. The Petitioner contends that four individuals, Leah Johnston, Robert "Clint" Ingram, Mike Caudill, and Joe Lewis, rather than just the two maintenance employees, were not previously employed as temporary employees. From the documents in evidence it appears that Mike Caudill and Clint Ingram are the maintenance electricians who were admittedly not part of the temporary pool prior to being hired full time. In addition, Joe Lewis who was hired as a full-time employee on March 14, 2003 may be Joseph Lewis who was hired as a temporary employee on June 13, 2002. Although the Employer's brief asserts that Leah Johnston, who became a full-time employee on September 26, 2001, was previously a temporary employee assigned clock number 1004, the record does not contain evidence regarding who had been assigned clock number 1004.

Benefits:

The benefits provided to the full-time employees are different from those available to the introductory or temporary employees except for unpaid personal leave, invitations to Employer social functions, and the Christmas gift. Full-time employees earn up to 5 weeks of vacation depending upon their length of service and receive 11 holidays, health and disability insurance, pension benefits, and a 401(k) plan. In addition, a clothing allowance, safety shoes and glasses, including prescription safety glasses, are available. Also, full-time employees are eligible for a production bonus. Introductory employees do not receive paid vacation time or health and disability insurance and are not eligible to participate in the pension or 401(k) plans. Their eligibility for these benefits is calculated from their hire date by the Employer as introductory employees. The record is silent as to holidays. Temporary employees get four holidays, earn a maximum of one week of vacation after 2000 hours of service, and may pay for COBRA and disability insurance, if they had coverage through the previous temporary service. Temporary employees are provided safety glasses, but not prescription glasses or safety shoes.

II. ANALYSIS

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties. *Overnite Transportation Company*, 331 NLRB 662, 663 (2000). The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for

employee classifications. *Bartlett Collins*, 334 NLRB 484 (2001). In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Bartlett Collins*, supra, citing, *Ore-Ida Foods*, 313 NLRB 1016 (1994). It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951).

Where employees in dispute are employed by a supplier employer, the issue is whether the temporary employees have a community of interest with the regular employees strong enough to mandate their inclusion in the same unit, i.e. absent their inclusion, the unit would no longer be appropriate. *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001) (Outokumpu I). As the Employer now directly employs the disputed employees, the *M. B. Sturges, Inc.*, 331 NLRB 1298, (2000) analysis no longer applies. Where the employees in dispute are employed by the same employer as other unit employees, their inclusion or exclusion from the unit is based on their relative community of interest with employees admittedly in the unit. In considering their community of interest with full time employees, the test for determining the eligibility of individuals designated as temporary employees has generally been whether they have an uncertain future. Thus, if the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *MJM Studios of New York, Inc.*, 336 NLRB 1255 (2001) *Personal Products Corp.*, 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433 (1958); *United States Aluminum Corp.*, 305 NLRB 719 (1991); *NLRB v. New England Lithographic Co.*, 589

F.2d 29 (1st Cir. 1978). The Board has also included so-called temporary employees who have worked for substantial periods where there is no likelihood that their employment will end in the immediate foreseeable future. *Horizon House I, Inc.*, 151 NLRB 766 (1965). Likewise, temporary employees drawn from the same labor force each year, employed every year in substantial numbers for substantial periods of time, composed primarily of former employees, and working with and doing the same kind of work as the permanent employees have a sufficient interest in the conditions of employment to be included despite differences in working conditions, remuneration, and the temporary nature of the work. *F.A. Bartlett Tree Expert Co.*, 137 NLRB 501 (1962).

In *Outokumpu I*, the Board included the temporary employees, who were considered contingent, supplied employees, because it found a “strong” community of interest based on evidence the temporaries worked side-by-side with the regular production employees, performed the same work functions, and were supervised by the same supervisors. The Petitioner argues the Board’s decisions in *Engineered Storage Products Co.*, 334 NLRB 1063 (2001) and *Lodgian, Inc., d/b/a Holiday Inn City Center*, 332 NLRB 1246 (2000) support its position that based on the disparity in pay and benefits, the temporaries’ inclusion in the unit is not mandated. *Engineered Storage* is distinguishable from the instant case in that the Board found that the employer had not hired any temporary employees for over two and one-half years, had never hired a supplied employee, and had evidenced no intent to do so at that time. Likewise, in *Holiday Inn*, the record reflected that the supplied employees were not considered for regular employment by the employer and that the employer was contractually prohibited from hiring any of its temporary employees by one of the supplier employers.

In the instant case, for about the last two years, the evidence establishes that the Employer has utilized its pool of temporary employees as its sole source for full-time employees except for its maintenance electricians, and the record reflects that the Employer intends to continue selecting its full-time employees from its temporary pool. The Petitioner further argues that because the temporaries do not automatically become regular employees of the Employer, they do not have a sufficient expectation of permanent employment for their inclusion in the unit to be mandated. While there have been temporary employees who were not hired as full-time employees, the record reflects that no temporary employee has been released because their 15 months expired, and all full-time employees hired come from the temporary pool.

Regarding the current working conditions, the record continues to reflect that temporaries, like regular employees, are assigned to all shifts, work in the same plant areas and are part of the same production operations. The Employer's supervisors evaluate the temporaries for future employment in the Employer's work force, and temporaries are the sole source for the Employer's regular work force, except maintenance electricians. While the temporaries do not receive most of the benefits of regular employees, neither do the introductory employees, whose inclusion in the unit is not disputed. Additionally, the temporary employees are now directly employed by and have all aspects of their employment controlled by the Employer. I do not find that circumstances have sufficiently changed to warrant a reversal of the prior conclusion that their inclusion is mandated by the strength of their community of interest with the Employer's full-time and introductory employees.

III. CONCLUSION AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

INCLUDED: All full-time, introductory, and regular temporary production and maintenance employees including production team leaders, assistant team leaders⁴, lab technicians, and plant clericals, employed by the Employer at its Franklin, Kentucky facility.

EXCLUDED: All summer temporary employees, office clerical and professional employees, guards, and supervisors⁵ as defined in the Act.

⁴ The parties stipulated and the record reflects that the following 15 team leaders and 4 assistant team leaders are not supervisors within the meaning of Section 2(11) of the Act and possess no authority to hire, fire or discipline employees, nor can they effectively recommend such actions: Donald White, Herman Poole, Harold Blair, Pat Ford, Eric Spears, James McFall, Dave Becker, Carol Lee, Bridget Smith, William Forewright, Neil Walton, Robert Johnson, William Britt, Danny Hayes, Randy Bailey, James Gillihan, Len Wilson, Ronnie Lathen, and Steve Pinson. Therefore, in agreement with the parties, I shall include them in the unit found appropriate herein.

⁵ The parties stipulated, and the record reflects, that the following shift production coordinators and the manager of core technical development hire, fire, discipline, or effectively recommend such action in a manner requiring the use of independent judgment and are supervisors within the meaning of Section

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the United Steelworkers of America, AFL-CIO-CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

2(11) of the Act: Joe Austin, Jim Dinkins, Doug Griffin, Matt Wakefield, and Tim Young. In addition, the parties stipulated, and the record reflects, that Geoff Palmer, president and general manager; Bob Joyce, director of manufacturing; Ray Chaffin, shipping and receiving supervisor; Scott Stringer, IG operations manager; Rick Dinkens, IG ops leader first shift; Dave Small, IG ops leader second shift; Tim Blick, IG ops leader third shift; Deborah Brock, IG ops leader fourth shift; and David Neagle and Nikki Huffins, maintenance team leaders, are also supervisors within the meaning of Section 2 (11) of the Act.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before **October 23, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections

are filed. The list may be submitted by facsimile transmission at (901) 544-0008. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **October 30, 2003**. The request may **not** be filed by facsimile.

Dated at Memphis, Tennessee, this day of 16th day of October 2003.

/S/

Ronald K. Hooks, Regional Director
Region 26, National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627
(901) 544-0018

Classification Outline:
440-1760-2400
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